IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CHARLES L. JONES and GRACE L. JONES, husband and wife; ROBERT W. NICHOLS and MARY ANN NICHOLS, husband and wife; and ROBERT E. HEBERT, Plaintiffs/Counterdefendants/Appellees, v. LOUISE WHIPPLE, personally and as the personal representative for the Estate of Edson Whipple, Defendant/Counterclaimant/Appellant.	2 CA-CV 2004-0187 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-312608

Honorable Deborah Bernini, Judge

REVERSED

Ronald S. George

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P E L A N D E R, Chief Judge.

¶1 Louise Whipple, personally and as personal representative of the estate of her late husband, Edson Whipple, appeals from a second amended judgment entered after the trial court granted appellee Robert Nichols's motion for relief from judgment, filed pursuant to Rule 60(c), Ariz. R. Civ. P., 16 A.R.S., Pt. 2. After granting Nichols's motion, the trial court vacated an earlier judgment entered in favor of Whipple and against appellees jointly and severally. The court then entered the second amended judgment in which appellees were held only severally liable. Raising several issues, Whipple argues the trial court erred in granting Rule 60(c) relief and entering that judgment because joint and several liability against all of the appellees was proper. We agree and, therefore, reverse the trial court's order granting Rule 60(c) relief, vacate the second amended judgment that flowed from that order, and reinstate the first amended judgment.

BACKGROUND

¶2 The pertinent procedural facts are somewhat convoluted but not in dispute. In 1996, Nichols and his co-plaintiffs, Charles Jones and Robert Hebert, filed this action against Whipple, seeking declaratory relief. In their complaint, the plaintiffs (hereinafter referred to as appellees) alleged that they and Whipple had been partners in a partnership, the sole asset of which was a "Mining Lease," and that Whipple had assigned his interest in the partnership to the remaining partners. Appellees sought relief, inter alia, "[d]eclaring that . . . Whipple ha[d] no right, title or interest in and to the partnership."

¶3 Whipple answered the complaint and counterclaimed, alleging, inter alia, fraud and breach of fiduciary duties. Finding that Whipple's counterclaims had "so little probative value, given the quantum of evidence required," the trial court (Judge Alfred) granted appellees' motion for summary judgment. On Whipple's appeal from that ruling, this court found "genuine issues of material fact" and consequently reversed and remanded the case for a determination of Whipple's claims. *Jones, Hebert & Nichols v. Whipple*, No. 2 CA-CV 97-0068 (memorandum decision filed Nov. 12, 1997).

¶4 After two trials, the first of which resulted in a mistrial, a jury found in favor of Whipple and against appellees and further found "[Whipple's] interest in the partnership to be 50%." By special interrogatory, the jury also found that appellees had committed fraud. Based on the jury's findings, the trial court (Judge Browning) directed Whipple's counsel to prepare a form of judgment.

¶5 In the proposed form of judgment he submitted, Whipple requested that appellees be held jointly and severally liable, arguing "[t]he evidence at trial [wa]s overwhelming that the [appellees had] acted in concert to defraud [him]." Appellees objected to Whipple's proposed form of judgment for several reasons, including the inclusion of joint and several liability. Despite their objection, the trial court granted Whipple's request for joint and several liability, "finding that the [appellees had] acted in concert in committing the fraud at issue in this case."

¶6 On July 18, 2001, "[b]ased upon the evidence presented at trial and the verdict and findings of the jury," the trial court found "that [the appellees had] acted in concert to

breach their fiduciary duties to and defraud [Whipple,]" and entered a "joint and several judgment in the amount of $848,947.10" against them. The judgment amount included Whipple's share in the partnership, prejudgment interest, and punitive damages in the total amount of $1,000.

¶7 Following entry of that judgment, appellees moved to alter or amend the judgment or alternatively for relief from judgment, pursuant to Rules 59(a)(8) and 60(a), Ariz. R. Civ. P., 16 A.R.S., Pt. 2. They asked the trial court to "eliminate the finding of fraud," arguing that claim had been "asserted well after the running of the statute of limitations for claims for fraud under A.R.S. § 12-543." The trial court granted the motion, finding that Whipple had discovered the facts constituting his fraud claim no later than 1990 and had not filed that claim until 1996, well after the three years "permitted by the relevant statute of limitations." On January 16, 2002, the trial court (J. Browning) entered an amended judgment that dismissed the fraud count but maintained joint and several liability against appellees.

¶8 Whipple appealed from that amended judgment on January 30, 2002. Then in May of that year, apparently after Whipple had attempted to collect on the amended judgment, Nichols filed a bankruptcy petition in federal court, and this court stayed Whipple's appeal pending the bankruptcy proceedings. After the bankruptcy court refused to discharge the amended judgment against Nichols, Whipple's appeal was dismissed pursuant to stipulation.

¶9 In July 2004, after conclusion of the bankruptcy proceedings, dismissal of Whipple's appeal from the amended judgment, and revesting of jurisdiction in the superior court, Nichols moved for relief from the amended judgment. Nichols claimed that the inclusion of joint and several liability in the amended judgment had been merely a mistake and, therefore, relief was warranted under Rule 60(c)(1) and (6), Ariz. R. Civ. P. The trial court (Judge Bernini) granted Nichols's motion, vacated the first amended judgment, and entered a second amended judgment in favor of Whipple and against appellees severally based on the amounts each had received from the partnership distributions. Whipple now appeals from that second amended judgment.[1] We have jurisdiction pursuant to A.R.S. § 12-2101(A).

DISCUSSION

I. Propriety of Rule 60(c) relief

¶10 We first address Whipple's contention that "[t]here was no legal basis for the second amended judgment[,] and [thus,] it should be overturned and set aside." Whipple claims that because "[t]he [trial] court [originally] imposed joint and several liability for both fraud and breach of fiduciary duty," a "Rule 60(c) . . . motion [wa]s not a proper vehicle to challenge that finding." Whether a trial court properly interprets or applies a court rule is a question of law that we review de novo. *Allstate Indem. Co. v. Ridgely*, 214 Ariz. 440, ¶ 8, 153 P.3d 1069, 1071 (App. 2007).

[1]After Whipple appealed from the second amended judgment and filed her opening brief, this appeal was stayed for an extended period pursuant to a bankruptcy court stay of proceedings while Nichols sought relief again in that forum.

¶11 "It is established that Rule 60(c) is not an alternative . . . to other procedures for obtaining review of erroneous legal rulings such as a motion for new trial or amended judgment under Rule 59[, Ariz. R. Civ. P., 16 A.R.S., Pt. 2]." *Craig v. Superior Court*, 141 Ariz. 387, 388, 687 P.2d 395, 396 (App. 1984) (citation omitted); *see also Tippet v. Lahr*, 132 Ariz. 406, 408, 646 P.2d 291, 293 (App. 1982) ("[A] motion under Rule 60(c) is not a device for reviewing or correcting legal errors that do not render the judgment void."). Rather, motions that seek substantive modifications of an existing judgment must be brought pursuant to Rule 59. *Finch v. City of Vernon*, 845 F.2d 256, 258-59 (11th Cir. 1988); *see also Norman v. Ark. Dep't of Educ.*, 79 F.3d 748, 750 (8th Cir. 1996) ("'whatever its label,'" "'any motion that draws into question the correctness of the judgment is functionally a motion under [Rule 59]'"), *quoting Quartana v. Utterback*, 789 F.2d 1297, 1300 (8th Cir. 1986) (alteration in *Norman*); *Osterneck v. E.T. Barwick Indus., Inc.*, 825 F.2d 1521, 1526 (11th Cir. 1987) (when a post-judgment motion "requests a substantive alteration of a court's judgment[, it] must be made pursuant to Rule 59[]").[2]

¶12 Nichols argued below that, because "the [fraud] to which the claim of joint and several liability attached ha[d] been dismissed, . . . the joint and several liability provision must likewise be stricken from the judgment," and that "joint and several liability cannot attach to a claim for breach of fiduciary duty." Those arguments essentially questioned the legal correctness of the amended judgment. But again, "a motion under Rule

[2]*See Bayham v. Funk*, 3 Ariz. App. 220, 221, 413 P.2d 279, 280 (1966) (we may rely on federal court cases construing federal counterpart of Arizona's civil procedure rules); *cf. Tippit v. Lahr*, 132 Ariz. 406, 408, 646 P.2d 291, 293 (App. 1982).

60(c) is not to be used for reviewing or correcting legal errors which do not render the judgment void." *Craig*, 141 Ariz. at 388, 687 P.2d at 369; *see also Tippit*, 132 Ariz. at 408-09, 646 P.2d at 293-94 (noting that "[w]hile the precise scope of Rule 60(c) relief defies neat encapsulation," the rule "is primarily intended to allow relief from judgments that, although perhaps legally faultless, are unjust because of extraordinary circumstances that cannot be remedied by legal review").

¶13 In interpreting the federal counterpart to Rule 60(c), the Eleventh Circuit has stated that inclusion of joint and several liability within a judgment is "clearly a substantive issue going to the heart of the judgment." *Finch*, 845 F.2d at 259. Because that also is true with respect to the provision of joint and several liability in the first amended judgment here, we question the appropriateness of Rule 60(c) relief. And, as discussed in detail below, the finding of joint and several liability was not necessarily dependent on survival of Whipple's fraud claim. Because a legal basis existed for imposing joint and several liability in the first amended judgment, even after the fraud claim had been eliminated, the decision on whether such liability should remain is a substantive, legal question, review of which is not amenable to Rule 60(c). *See Craig*, 141 Ariz. at 388, 687 P.2d at 369; *Tippit*, 132 Ariz. at 408-09, 646 P.2d at 293-94.

¶14 Thus, in order to properly challenge the inclusion of joint and several liability in the first amended judgment, within fifteen days of its entry Nichols should have moved "to alter or amend the judgment" pursuant to Rule 59(*l*). "[A]nd Rule 6(b), [Ariz. R. Civ. P., 16 A.R.S., Pt. 1,] provides that the time for filing a Rule 59(*l*) motion may not be

enlarged." *Egan-Ryan Mech. Co. v. Cardon Meadows Dev. Corp.*, 169 Ariz. 161, 166, 818 P.2d 146, 151 (App. 1990). Because Nichols neither sought to alter or amend the first amended judgment under Rule 59 nor appealed from it, the trial court erred in substantively modifying that judgment pursuant to Rule 60(c).

II. Proof of mistake

¶15 Even if Rule 60(c) were an appropriate mechanism for seeking the relief Nichols sought, however, we also find no basis for granting such relief. Whipple argues "Nichols . . . did not meet [his] burden of proof justifying Rule 60(c) relief" because "[t]here was no mistake or excusable neglect." As noted above, in July 2004, pursuant to Rule 60(c)(1) and (6), Ariz. R. Civ. P., Nichols moved for relief from the first amended judgment of January 2002, claiming that mistakenly "the parties [had] overlooked the fact that the joint and several liability provision remained" even after the fraud claim "ha[d] been dismissed."[3] Although it was appellees' own counsel who had submitted the amended

[3]Rule 60(c)(1), Ariz. R. Civ. P., 16 A.R.S., Pt. 2, provides relief from judgment for "mistake, inadvertence, surprise or excusable neglect." Subpart (6) of that rule permits relief for "any other reason justifying relief from the operation of the judgment." We note that in the last line of their answering brief, appellees state "the trial court . . . was justified in granting relief under both Section A and B(6) [sic] of Rule 60." Rule 60(a) pertains to clerical mistakes. We do not address whether that rule might apply here because appellees waived any such claim by not asserting it below or adequately developing it on appeal. *See Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, ¶ 15, 99 P.3d 1030, 1035 (App. 2004); *see also* Ariz. R. Civ. App. P. 13(b)(1), 17B A.R.S.; *Williams v. Baugh*, 214 Ariz. 471, ¶ 13, 154 P.3d 373, 376 (App. 2007).

judgment that retained joint and several liability, Nichols argued "th[e] issue [had been] overlooked" until after he had filed bankruptcy.[4]

¶16 Without noting its reasons, the trial court (J. Bernini) found "sufficient cause to grant [Nichols's] Motion for Relief from Judgment" and set aside the January 2002 judgment that Judge Browning had entered.[5] "We will not disturb the trial court's decision on a motion to set aside a judgment absent an abuse of discretion." *Tovrea v. Nolan*, 178 Ariz. 485, 490-91, 875 P.2d 144, 149-50 (App. 1993). "A court abuses its discretion if it commits legal error in reaching a discretionary conclusion, or if the record lacks substantial evidence to support its ruling." *Tritschler v. Allstate Ins. Co.*, 213 Ariz. 505, ¶ 41, 144 P.3d 519, 532 (App. 2006).

¶17 "To obtain relief under Rule 60(c)(1), a party must 'show (1) mistake, inadvertence, surprise or excusable neglect; (2) that relief was sought promptly; and (3) that a meritorious claim existed.'" *Maher v. Urman*, 211 Ariz. 543, ¶ 21, 124 P.3d 770, 777 (App. 2005), *quoting Copeland v. Ariz. Veterans Mem'l Coliseum*, 176 Ariz. 86, 89, 859

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[4]Nichols argued below:

> Whipple filed in the Bankruptcy Court an action to have the Amended Judgment determined to be non-dischargeable, and the Bankruptcy Court, concluding that it was bound by the prior holding that the debt was joint and several, held the entire judgment amount to be non-dischargeable on the ground that Nichols had failed to account (defalcation) for the proceeds from the gold mine, including those amounts he never received.

[5]Before being reassigned to Judge Bernini in June 2004, the case had been before Judge Browning.

P.2d 196, 199 (App. 1993); *see also State ex rel. Corbin v. Marshall*, 161 Ariz. 429, 431-32, 778 P.2d 1325, 1327-28 (App. 1989) (it is the moving party's burden to establish that relief is warranted under Rule 60(c)). Whipple argues Nichols failed to establish that the inclusion of joint and several liability in the first amended judgment was merely a mistake when the trial court's original judgment stated "joint and several liability was properly imposed for fraud and breach of fiduciary duty." The trial court, Whipple further argues, had "no justification for vacating the First Amended Judgment" and, therefore, "it should be reinstated."

¶18 Conversely, Nichols claims "[t]he failure to exclude language relating to joint and several liability can only be attributed to mistake or inadvertence" because "joint and several liability cannot attach to [the only remaining] claim of breach of fiduciary duty."[6] As Nichols correctly points out, joint and several liability has been largely abolished in Arizona. *See* A.R.S. § 12-2506(D); *see also Jimenez v. Sears, Roebuck and Co.*, 183 Ariz. 399, 404, 904 P.2d 861, 866 (1995) ("We have recognized that the general goal of the present version of [the Uniform Contribution Among Tortfeasors Act (UCATA), A.R.S. §§ 12-2501 to 12-2509] is to make each tortfeasor responsible for *only* its share of fault."). But, § 12-2506(D) provides an exception to the general rule, stating that "a party is responsible for the fault of another person, or for payment of the proportionate share of

[6]Whipple argues that "Nichols['s answering] brief should be rejected" because it "was not timely filed." But in a March 20, 2007 order, this court granted Nichols "to and including April 13, 2007 to file an answering brief." Nichols's answering brief was timely filed with this court on April 13. Accordingly, we do not reject it.

another person, if," inter alia, "[b]oth the party and the other person were acting in concert." § 12-2506(D)(1). The statute further defines "'[a]cting in concert'" as "entering into a conscious agreement to pursue a common plan or design to commit an intentional tort and actively taking part in that intentional tort." § 12-2506(F).

¶19 Nichols claims that "breach of [a] fiduciary duty is an[] equitable action, not a tort action," and thus "joint and several liability cannot attach to a claim for breach of fiduciary duty." But, as Whipple points out, *Sertich v. Moorman*, 162 Ariz. 407, 783 P.2d 1199 (1989), on which Nichols relies for the proposition that the breach of a fiduciary duty is not a tort action, "says no such thing." Rather, in abolishing the requirement that there be an accounting of a partnership before partners could maintain an action at law against one another, the court in *Sertich* simply recounted the historical origins of equitable actions between partners. *Id*. at 408-11, 783 P.2d at 1200-03. *Sertich* did not discuss the nature of a breach of fiduciary duty. *Id.*

¶20 In fact, "[a] fiduciary who commits a breach of his duty as a fiduciary is guilty of *tortious* conduct to the person for whom he should act." Restatement (Second) of Torts § 874 cmt. b (2007) (emphasis added). That the breach of a fiduciary duty sounds in tort is recognized in Arizona. *See Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 15, 945 P.2d 317, 326 (App. 1996) (listing breach of fiduciary duty among plaintiffs' tort claims); *AMERCO v. Shoen*, 184 Ariz. 150, 154-55, 907 P.2d 536, 540-41 (App. 1995) (trial court did not err in finding that plaintiff must prove actual damages stemming from tort of breach of fiduciary duty). Several other jurisdictions also have determined that the breach

of a fiduciary duty is an intentional tort. *See Zastrow v. Journal Comm'ns, Inc.*, 718 N.W.2d 51, ¶¶ 37-40 (Wis. 2006) (collecting authority for proposition that "breach of fiduciary duty . . . is an intentional tort"); *see also Berg v. Wagner*, 935 So. 2d 100, 102 (Fla. Dist. Ct. App. 2006) ("breach of fiduciary duty is an intentional tort"); *Burns v. Prudential Sec., Inc.*, 857 N.E.2d 621, 646 (Ohio Ct. App. 2006) (same); *Beloit Liquidating Trust v. Grade*, 677 N.W.2d 298, 311 (Wis. 2004) (same).

¶21 In the original judgment, the trial court (J. Browning) expressly found that "[appellees had] *acted in concert to breach their fiduciary duties* to . . . [Whipple]." (Emphasis added.) Accordingly, joint and several liability could have attached to the tort of breach of fiduciary duty as well as the tort of fraud. Because joint and several liability could have been based on Whipple's claim of breach of fiduciary duty, Nichols failed to affirmatively establish that either the trial court or the parties simply made a mistake when joint and several liability was retained in the first amended judgment.

¶22 Still, Nichols asserts that when the trial court initially granted Whipple's motion in support of joint and several liability, it "specifically discusse[d the] factual basis for imposing joint and several liability and limit[ed] that liability only through [sic] the fraud claim." In its minute entry granting Whipple's motion for joint and several liability, the trial court did rely on "the finding that the [appellees had] acted in concert in committing the fraud at issue in this case." But that ruling simply did not mention breach of fiduciary duty or indicate that joint and several liability was appropriate based *only* on the jury's finding of fraud. And, Nichols has not cited, nor have we found, any authority for the proposition

that when a trial court imposes joint and several liability it must set forth every ground on which that liability is based. *See* Ariz. R. Civ. App. P. 13(b)(1), 17B A.R.S.

¶23 The discussion of fraud in the trial court's minute entry granting joint and several liability does not undermine the express statement in the court's actual judgment that, "[b]ased upon the evidence presented at trial and the verdict and findings of the jury[,] the court hereby finds that [appellees] *acted in concert to breach their fiduciary duties* to and defraud [Whipple]." (Emphasis added.) Although Nichols thereafter successfully moved to amend that judgment to eliminate the fraud finding, his motion did not challenge the trial court's finding that appellees had acted in concert in breaching their fiduciary duties. And, based on that finding, joint and several liability could have been retained even after fraud was eliminated. *See* § 12-2506(D)(1). Accordingly, Nichols failed to sustain his burden of proving an actual mistake. And when, as here, the "record lacks substantial evidence to support [the trial court's] ruling," its ruling amounts to an abuse of discretion. *See Tritschler*, 213 Ariz. 505, ¶ 41, 144 P.3d at 532.[7]

DISPOSITION

¶24 We reverse the trial court's order granting Nichols's motion for relief under Rule 60(c), vacate the second amended judgment of August 26, 2004, and reinstate the trial

[7]As noted earlier, Nichols's motion for relief from judgment also cited Rule 60(c)(6), which permits relief for "any other reason justifying relief from the operation of the judgment." But he only claimed that relief was warranted because joint and several liability had been mistakenly included in the first amended judgment. Accordingly, as Whipple argues, "[a] Rule 60(c)(6) motion [wa]s not . . . justified." *See Webb v. Erickson*, 134 Ariz. 182, 186, 655 P.2d 6, 10 (1982) ("the reason for setting aside the [judgment or order under subsection (6)] must *not* be one of the reasons set forth in the five preceding clauses").

court's amended judgment of January 16, 2002. In our discretion, we deny Whipple's request for attorney fees made pursuant to Rule 25, Ariz. R. Civ. App. P., 17B A.R.S.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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GARYE L. VÁSQUEZ, Judge